NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Appeals

FILING OTHER THAN MOTION Electronically Filed:
December 11, 2015 16:16

By: ROBERT E. DEROSE 0055214

Confirmation Nbr. 617657

STEVEN SCHMITZ, ET AL.

CA 15 103525

vs.

Judge:

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

Pages Filed: 56

IN THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

EIGHTH APPELLATE DISTRICT

ESTATE OF STEVEN T. SCHMITZ and YVETTE SCHMITZ, individually and as Fiduciary of Estate of Steven T. Schmitz, Deceased Plaintiffs-Appellants, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, AND UNIVERSITY OF NOTRE DAME, Defendants-Appellees	:	Case No.: CA-15-103525

APPEAL FROM COMMON PLEAS COURT FOR
CUYAHOGA COUNTY, OHIO

BRIEF OF PLAINTIFFS-APPELLANTS

Robert E. DeRose
Supreme Court No. 0055214
BARKAN MEIZLISH HANDELMAN GOODIN DEROSE WENTZ, LLP
250 E. Broad St., 10th Floor
Columbus, Ohio 43215
Telephone: 614-221-4221

and

David D. Langfitt (PHV No. 5921-2015)
Melanie J. Garner (PHV No. 6051-2015)
LOCKS LAW FIRM
The Curtis Center
601 Walnut Street, Suite 720E
Philadelphia, PA 19106
Telephone: (215) 893-3423

Attorneys for Plaintiffs-Appellants

Matthew A. Kairis
Aaron M. Healey
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215-2673
Telephone: 614.281.3605
Attorneys for Defendant-Appellee University of Notre Dame

Steven A. Friedman
Frederick R. Nance
Sean L. McGrane
SQUIRE PATTON BOGGS LLP
4900 Key Tower
27 Public Square
Cleveland, Ohio 44114
Attorneys for Defendant-Appellee National Collegiate Athletic Association

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Cases

Rules

Statutes

ASSIGNMENT OF ERROR PRESENTED FOR REVIEW

> The trial court erred by granting the Motions to Dismiss, because the Complaint's allegations are sufficient to state each claim, and the Complaint does not conclusively show on its face that Plaintiffs-Appellants' claims are barred by any statute of limitations. (Decision and Entry, September 1, 2015)

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in granting Defendants-Appellees' Motions to Dismiss on the basis of the statute of limitations where the Amended Complaint conclusively establishes that Plaintiffs-Appellants did not discover and could not have discovered until December 2012 that Steve Schmitz had developed latent brain disease caused by football and, specifically, chronic traumatic encephalopathy ("CTE"), the signature latent disease of football?

2. Did the trial court err in granting Defendants-Appellees' Motions to Dismiss where Plaintiffs-Appellants plead sufficient facts to support each claim under the law of Ohio and/or Indiana?

STATEMENT OF THE CASE

Plaintiffs-Appellants' Decedent, Steven T. Schmitz (hereinafter "Steve Schmitz") played football at the Defendant-Appellee University of Notre Dame (hereinafter "Notre Dame"), a member institution of Defendant-Appellee the National Collegiate Athletic Association (hereinafter "the NCAA"), from 1974 to 1978. In or around December 2012, Plaintiffs-Appellants were first informed by a competent medical authority, the Cleveland Clinic Neurology Department, that Steve Schmitz suffered from CTE, the latent brain disease caused by repetitive head impacts in football. Before the diagnosis, Steve Schmitz did not have an opinion from a competent medical authority that his medical condition arose from football.

In June 2014, approximately eighteen (18) months after the diagnosis, Steve and Yvette Schmitz, the Plaintiffs-Appellants, first filed a Complaint in the federal district court for the

Northern District of Ohio. They voluntarily dismissed that Complaint without prejudice based on an agreement with the Defendants-Appellees after the NCAA informed Plaintiffs-Appellants that Ohio was one of its home states for jurisdictional purposes.

In October 2014, Steve and Yvette Schmitz filed the Complaint in Cuyahoga County Common Pleas Court against the Defendants-Appellees. The Complaint alleges counts of negligence, fraudulent concealment (or fraud by concealment), constructive fraud, breach of express and implied contract, and loss of consortium.

Without filing a responsive pleading, Defendants-Appellees filed Motions to Dismiss on December 22, 2014 under Ohio Rule of Civil Procedure 12(B)(6). They argued primarily that all of Plaintiffs-Appellants' claims are barred by Ohio's statute of limitations.

In response, Plaintiffs-Appellants opposed the Motions and simultaneously filed a Motion for Leave to File an Amended Complaint, which the trial court granted. The Amended Complaint was deemed filed on February 9, 2015.

Steve Schmitz died on February 13, 2015. Plaintiffs-Appellants filed a Notice of Suggestion of Death seven days later and attached a copy of the Death Certificate of Steve Schmitz, which listed, among other things, CTE as the cause of death.

On March 3, 2015, Defendants-Appellees re-filed their Motions to Dismiss and, again, primarily argued that all of the claims are barred by Ohio's statute of limitations.

Plaintiffs-Appellants opposed the Motions on March 18, 2015.

Defendants-Appellees filed a Motion for leave to file a reply on April 7, 2015, which the trial court granted.

On May 20, 2015, Plaintiffs-Appellants filed an unopposed Motion to Substitute Parties, which the trial court granted on May 27, 2015. Thereafter, the Estate of Steve Schmitz became a

plaintiff and Yvette Schmitz became the plaintiff as fiduciary of her husband's estate and in her personal capacity.

On June 5, 2015, Plaintiffs-Appellants filed a Notice of Supplemental Authority in further support of their Opposition to the Motions to Dismiss. They attached a copy of a recent opinion in an analogous case in which the United States District Court for the District of Minnesota denied a similar motion to dismiss by the National Hockey League (NHL) based on a similar statute of limitations argument.

On August 13, 2015, Plaintiffs-Appellants filed a motion requesting a status conference to discuss the Motions to Dismiss, a case management schedule, and a discovery schedule.

By journal entry of September 1, 2015, the trial court granted Defendants-Appellees' Motions without opinion and dismissed the Amended Complaint with prejudice. (September 1, 2015 Journal Entry Granting Motions to Dismiss with Prejudice, attached to the Appendix as Exhibit A).

On September 9, 2015, Plaintiffs-Appellants filed a Motion for Findings of Fact and Conclusions of Law, which the trial court denied by journal entry the next day. (September 9, 2015 Journal Entry Denying Plaintiff's Motion for Findings of Fact and Conclusions of Law, attached to the Appendix as Exhibit B).

On September 18, 2015, Plaintiffs-Appellants filed their Notice of Appeal and perfected their appeal to this Honorable Court.

STATEMENT OF FACTS

This case arises from the NCAA's and Notre Dame's reckless disregard for the safety of amateur collegiate football players generally and specifically for the safety of the Decedent,

Steve Schmitz, a former running back and receiver for the Notre Dame football team between 1974 and 1978. (Amended Complaint (hereinafter "Complaint") ¶ 1).

When Steve Schmitz played football at Notre Dame, he was exposed – like all other Notre Dame and NCAA football players – to the risk of developing long-term brain disease caused by concussive hits to the head. (Complaint ¶¶ 127-128).

At no time, however, either during college or in the decades after he played football, did Steve Schmitz ever know or realize he had been exposed to the risk of latent brain disease caused by concussive blows to the head during football. (*Id.* at ¶¶ 22, 129). When Steve Schmitz was a player, neither he nor the football leadership of Notre Dame ever recognized that he sustained a head injury of any kind. (*Id.* ¶ 68). At no time did Notre Dame ever test or examine Steve Schmitz for concussion symptoms or advise or educate him about what a concussion was or what concussion symptoms were. (*Id.* at ¶ 67). At no time were any symptoms that Steve Schmitz experienced recognized by him or Notre Dame as an injury that should be monitored, treated, or even acknowledged. (*Id.* at ¶¶ 64-65). At no time during his participation on the Notre Dame football team was Steve Schmitz in a position to understand or appreciate the risks of concussive and sub-concussive impacts. (*Id.* at ¶ 18).

Instead, Steve Schmitz relied upon the guidance, expertise, and instruction of both Notre Dame and the NCAA regarding the serious and life-altering medical issue of concussive and sub-concussive risk in football. (*Id.* at ¶ 124). At all times, Defendants-Appellees had superior knowledge of material information regarding the effect of repetitive concussive events. (*Id.* at ¶ 125). Because such information was not readily available to Steve Schmitz, Defendants-Appellees knew or should have known that Steve Schmitz would act and rely upon the guidance, expertise, and instruction of Defendants-Appellees on this crucial medical issue, while at Notre

Dame and thereafter. (*Id.* at ¶ 125). Given Defendants-Appellees' superior knowledge and unique vantage point, Steve Schmitz reasonably looked to and otherwise relied upon Defendants-Appellees for guidance on health and safety issues, such as disclosing to him information, precautionary measures, and warnings about concussions, including the later-in-life consequences of repetitive head impacts he sustained while a football player at Notre Dame. (*Id.* at ¶ 138).

Soon after Steve Schmitz graduated from college, he stopped playing football and obtained employment in various companies within the Cleveland area. (*Id.* at ¶19) Decades later, on or around December 2102, Steve Schmitz was diagnosed by the Cleveland Clinic Neurology Department, a competent medical authority, with CTE, the signature latent brain disease of football. (*Id.* at ¶¶ 20-21). At the time of the diagnosis, Steve Schmitz was 57 years old and unemployable. He suffered from severe memory loss, cognitive decline, early onset Alzheimer's disease, traumatic encephalopathy, and dementia, all of which were caused, aggravated, and/or magnified by the repetitive concussive blows to the head he suffered while playing football at Notre Dame. (*Id.*).

For these reasons, only when Steve Schmitz received a diagnosis of brain disease, more specifically CTE, caused by football did he know that he had sustained undiagnosed concussive blows to the head as a Notre Dame football player that resulted in a latent brain disease. (*Id.* at ¶¶ 22, 129). Prior to the diagnosis, Steve Schmitz did not know and had no grounds to believe that he had suffered a latent injury caused by football. (*Id.* at ¶¶ 22, 129).

On the other hand, Defendants-Appellees affirmatively undertook duties (by common law and contract) to protect the health and well-being of Steve Schmitz, but they failed to perform those duties. (*Id.* at ¶¶ 44-58). Both before and after Steve Schmitz played football at

Notre Dame, the NCAA and Notre Dame knew or should have known of (a) the mounting literature and medical evidence regarding the latent effects of concussive impacts; (b) the need to disclose such information to football players; (c) the need for pre-season baseline psychological testing; and (d) the need for safe return to play guidelines. (*Id.* at ¶ 69). Defendants-Appellees knew or should have known the vast reservoir of information about the risks of concussive head impacts from football (and boxing) and their long-term latent effects. They failed, however, to inform or protect Steve Schmitz and other Notre Dame football players regarding this risk, which is the single worst injury players can sustain short of paralysis. (*Id.* at ¶¶ 36, 38-41, 69-101).

For example, studies dating back as far as 1928 demonstrate a scientifically-observed link between repetitive blows to the head and short-term and long-term cognitive problems. (*Id.* at ¶ 4). The 1928 study, which was published in the *Journal of the American Medical Association*, was the first to link sub-concussive blows and "mild concussions" to degenerative brain disease. (Complaint ¶ 71). A 1963 study published in the *Lancet* found that some boxers sustain chronic neurological damage as a result of repeated head injuries, which manifested in the form of dementia and impaired motor function. (Complaint ¶ 67). Numerous other studies regarding concussions and football-related head trauma were published in medical journals from 1952 to 1994. (*Id.* at ¶ 87). Indeed, medical science, including world-renowned departments of medicine in NCAA member institutions, has known for many decades that repetitive and violent jarring of the head or impact to the head can cause sub-concussive and/or concussive impacts with a heightened risk of long term, chronic neuro-cognitive sequelae. (*Id.* at ¶ 36, 41).

Defendants-Appellees have known (or should have known) for many years that former football players, including former NCAA players, who sustain repetitive impacts are exposed to an elevated risk of developing any number of conditions, including the debilitating latent disease

known as CTE, which involves the slow build-up of the Tau-protein within the brain tissue that causes diminished brain function, progressive cognitive decline, and many of the symptoms listed above. (*Id.* at ¶ 41).

Repetitive concussive and sub-concussive impacts during college football practices and games have a pathological and latent effect on the brain. (*Id.* at ¶ 126). Repetitive exposure to accelerations to the head causes deformation, twisting, shearing, and stretching of neuronal cells such that multiple forms of damage take place, including the release of small amounts of chemicals within the brain, such as Tau protein, which is a signature pathology of CTE. (*Id.*). The repetitive head accelerations and hits to which Steve Schmitz was exposed presented risks of latent and long-term chronic illnesses. (*Id.* at ¶ 128).

As early as 1933, and certainly between the early 1970s and the 1990s, which includes the time period within which Steve Schmitz played football at Notre Dame, Defendants-Appellees knew that repetitive head impacts in football and full-contact practices created a substantial risk of harm to student-athletes that was similar or identical to the risk of harm to boxers. (*Id.* at ¶ 134-135). Despite this knowledge, the NCAA and Notre Dame concealed these risks from players, including Steve Schmitz, with the intent of misleading them into believing they were safe and would not suffer any long-term brain disease. (*Id.* at ¶ 136).

Defendants-Appellees were in a unique position to know the immense body of scientific evidence and its compelling conclusions. (*Id.* at ¶ 9). They had (and have) the resources and sole power to implement measures to prevent or minimize the brain injury risk to which Steve Schmitz and other Notre Dame football players are exposed. (*Id.*).

Notwithstanding their knowledge, resources, and power, Defendants-Appellees orchestrated an approach to football practices and games that (a) ignored the medical risks; (b)

aggravated and enhanced the medical risks; (c) failed to educate Steve Schmitz and other football players of the link between concussive and sub-concussive impacts in football and latent brain disease; and (d) failed to implement or enforce any system that would have mitigated, prevented or addressed the brain injury risk. (*Id.* at ¶¶ 2, 10). Even worse, Notre Dame actively encouraged, taught, and demanded that Steve Schmitz and other Notre Dame football players use their helmets as weapons to inflict head impacts on one another during practices and on their opponents during games. (*Id.* at ¶¶ 60-63, 123). Despite numerous research studies, Defendants-Appellees never contacted Steve Schmitz after he had graduated to inform him that he had been exposed to an increased risk of long-term brain disease as a player for Notre Dame. (*Id.* at ¶ 106). They failed to provide adequate notification, warning and treatment for the brain disease from which Steve Schmitz eventually developed. (*Id.* at ¶ 121).

As a direct and proximate result of Defendants-Appellees' tortious conduct, Steve Schmitz sustained CTE and other brain diseases that developed slowly over time and resulted in full disability at age 58. (*Id.* at ¶¶ 11, 128-130, 140-41, 153).

Notwithstanding these allegations, all of which are deemed to be true at this stage of the proceedings, the trial court granted Defendants-Appellees' Motions to Dismiss the Complaint. This was obvious error and warrants reversal by this Court.

ARGUMENT

Assignment of Error

> The trial court erred by granting the Motions to Dismiss, because the Complaint's allegations are sufficient to state each claim, and the Complaint does not conclusively show on its face that Plaintiffs-Appellants' claims are barred by any statute of limitations. (Decision and Entry, September 1, 2015)

A. Procedural Standard

Appellate review of a trial court's decision on a motion to dismiss is *de novo*. *Mitchell v.*

Speedy Car X, 127 Ohio App.3d 229, 230, 712 N.E.2d 768 (9th Dist. 1998) (citing *Hunt v. Marksman Prods.*, 101 Ohio App.3d 760, 762, 656 N.E.2d 726 (9th Dist. 1995)). Where, as here, the trial court did not issue an opinion, the appellate court should presume that the trial court's reasons for granting the motions are an alleged failure to state a claim. *Ohio Assn of Pub. School Emps. v. School Emps. Retirement Sys. Bd.*, 10th Dist. Franklin No. 04AP-136, 2004-Ohio-7101, ¶ 42. The Complaint here, however, alleged multiple causes of action, so this Court must examine each claim separately to determine whether Plaintiffs-Appellants pled sufficient facts to withstand the Motions. *See id.*

The requirement for this Court upon *de novo* review is the same as the requirement for the trial court. "A motion to dismiss for failure to state a claim upon which relief can be granted … tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.,* 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992) (citation omitted). The motion "only determines whether the pleader's allegations set forth an actionable claim." *Pyle v. Ledex, Inc.,* 49 Ohio App.3d 139, 143, 551 N.E.2d 205 (12th Dist. 1988) (citation omitted). "A court may not use the motion to summarily review the merits of the cause of action." *Home Builders Assn. of Dayton & Miami Valley v. Lebanon,* 12th Dist. Warren No. CA2003-12-115, 2004-Ohio-4526, ¶ 8 (*citing State ex. rel. Martinelli v. Corrigan*, 68 Ohio St.3d 362, 363, 626 N.E.2d 954 (1994)).

"In order for a complaint to be dismissed under Civ.R. 12(B)(6), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *City of Cincinnati v. Beretta U.S.A. Corp.,* 95 Ohio St.3d 416, 418, 2002-Ohio-2480, 768 N.E.2d 1136 (emphasis added) (citation omitted). "In construing a complaint upon a motion to dismiss for failure to state a claim, [the Court] must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v.*

Lawson Milk Co., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988) (citations omitted). This Court may look only to the Complaint to determine whether the allegations are legally sufficient to state a claim. *Home Builders Assn.* at ¶ 8 (citation omitted). "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol,* 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991).

B. The Trial Court Erred in Dismissing the Complaint as Time-Barred.

It is axiomatic to the law of Ohio that unless the Complaint pleads averments that prove beyond doubt that under no set of facts could the plaintiff ever recover for his claim, a motion to dismiss must be denied. *Vandemark v. Southland Corp.*, 38 Ohio St.3d 1, 7, 525 N.E.2d 1374 (affirming denial of motion to dismiss where complaint did not show beyond doubt that the plaintiff's cause of action was time-barred); *Tarry v. Fechko Excavating, Inc.*, 9th Dist. Lorain No. 98CA007180, 1999 Ohio App. LEXIS 5130, at *5-6 (Nov. 3, 1999) (reversing and remanding judgment for defendant on motion to dismiss because the face of the complaint set forth facts upon which the plaintiff could recover, and applicable statute of limitations was tolled until plaintiff discovered the wrongdoer). For that reason, the Supreme Court of Ohio has stated that "[a] motion to dismiss a complaint under Civ. R. 12(B) which is based upon the statute of limitations is erroneously granted where the complaint does not conclusively show on its face the action is barred by the statute of limitations." *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 379, 433 N.E.2d 147 (1982) (citations omitted).

It is equally axiomatic that it is not necessary for a plaintiff to specify facts to defend against a motion to dismiss on a statute of limitations ground. *Warren v. Estate of Durham*, 9th Dist. Summit No. 25624, 2011-Ohio-6416, ¶ 7-8 (reversing dismissal because the complaint did

not prove beyond doubt that plaintiff's claim was barred by the statute of limitations); s*ee also Irvin v. Am. Gen. Finance, Inc.*, 5th Dist. Muskingum No. CT2004-0046, 2005-Ohio-3523. In *Irvin*, the appeals court reversed the trial court's entry of judgment for the defendants on a motion to dismiss and found that a violation of the statute of limitations was not obvious on the face of the complaint. *Id.* at ¶ 29-33. The appeals court noted that "[b]ecause Ohio is a notice pleading state, it suffices that the complaint put defendants on notice of the general claim. It was not necessary to specify facts to defend from a statute of limitations defense." *Id.* at ¶ 29, n. 11 (citation omitted); *see also, e.g.*, *Tarry* at *5-6. In *Tarry*, the plaintiff alleged trespass by flooding of his property based on improper underground construction on adjacent property. The improper construction and flooding began in 1991. Because the flooding was underground, plaintiff did not discover the cause and wrongdoer until 1997. The trial court dismissed the plaintiff's complaint on the grounds that the plaintiff had not pleaded facts purporting to extend the statute of limitation. *Tarry* at *3. The court of appeals reversed and stated that the defendant, not the plaintiff, must affirmatively plead the statute of limitations. This must be done in a responsive pleading, not on a motion to dismiss. *Id.* at *3-4. The appeals court stated:

> the affirmative defense of the statute of limitations is not one of the defenses which Civ. R. 12(B) specifically permits to be raised by motion before a responsive pleading. Because of this, dismissal pursuant to Civ. R. 12(B) is not appropriate on the basis of [defendant's] assertion that [plaintiff's] complaint is time-barred.
>
> Even if we view the dismissal in the manner the trial court did, the action was inappropriately dismissed. A motion to dismiss a complaint pursuant to Civ.R. 12(B)(6) may properly be granted when it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. University Community Tenants* Union (1975), 42 Ohio St. 2d 242, 327 N.E.2d 753, *syllabus*. "As long as there is a set of facts, consistent with the plaintiff's complaint, which would allow plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Highway Patrol (1991),* 60 Ohio St. 3d 143, 145, 573 N.E.2d 1063. The Supreme Court of Ohio has indicated that, "[a] motion to dismiss a complaint under *Civ. R. 12(B)* which is based upon the statute of limitations is erroneously granted where the complaint

> *does not conclusively show on its face* the action is barred by the statute of limitations." *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St. 2d 376, 379, 433 N.E.2d 147 (1982). (Emphasis added.) To conclusively show that the statute of limitations bars the action, the complaint must demonstrate both the relevant statute of limitations and the absence of factors which would toll the statute or make [the statute] applicable.

Tarry at *3-4.

Here, the Complaint pleads a latent undiscoverable injury that became manifest decades after Steve Schmitz played football. The cause of the injury was discovered only after (a) the symptoms became manifest and (b) a competent medical authority diagnosed the condition. For those reasons alone, the Complaint does not on its face show beyond doubt that the Plaintiff-Appellants cannot recover based on a statute of limitations defense. To the contrary, the record and Complaint show the opposite. Steve Schmitz filed his original Complaint approximately eighteen (18) months after he received the diagnosis from the Cleveland Clinic Neurology Department. For those reasons, the trial court's ruling was error and contrary to the law of Ohio. Discovery, which the lower court prevented by an erroneous ruling, will show that Steve and Yvette Schmitz became aware of the injury, the diagnosed medical cause, and the wrongdoer in December 2012 and filed their Complaint well within the two year limitation period.

1. The Trial Court Erred By Failing to Apply the Discovery Rule.

Under Ohio law, the discovery rule "applies in situations 'where the wrongful act does not immediately result in injury or damage.'" *See Metz v. Unizan Bank*, 649 F.3d 496, 497 (6th Cir. 2011) (*quoting Harris v. Liston*, 86 Ohio St.3d 203, 714 N.E.2d 377, 379 (1999)). The purpose of the rule is to prevent dismissal of an innocent victim's claim, when the victim could not have discovered the wrong, even when exercising care and diligence. *See Al-Mosawi v. Plummer*, 2nd Dist. Montgomery No. 24985, 2012-Ohio-6034, ¶ 22 *See also O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 87, 447 N.E.2d 727 (1983) (stating that in some situations

"application of the general rule 'would lead to the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before he is even aware of [the claim's] existence'") (citation omitted). Ohio courts have employed the discovery rule in several areas of the law, including medical malpractice, fraud, wrongful death, toxic exposure, and negligence cases. *See Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, 947 N.E.2d 672 (and cases cited therein).[1]

The Complaint's allegations here meet the requirements of this rule in Ohio. The statute of limitations begins to run in latent disease cases either (1) when a competent medical authority tells the plaintiff that he has been injured by the subject exposure or (2) by due diligence, the plaintiff should have discovered that he was injured by the exposure. *See O'Stricker* at 90. Here, Plaintiffs-Appellants pleaded that Steve Schmitz suffered from latent brain disease and discovered its cause and diagnosis later in life when the symptoms became manifest and the Cleveland Clinic diagnosed his condition. (Complaint ¶¶ 19-22, 129). Thus, his cause of action did not accrue until symptoms arose, and Steve Schmitz received a diagnosis that linked that condition to football. (*See id.* at ¶¶ 19-20, 129).

---

[1] In its Reply Brief to the lower court, the Defendant-Appellee NCAA argued incorrectly that the Ohio discovery rule is generally limited to cases involving exposure to asbestos or other invisible toxins or medical malpractice cases. (NCAA Reply Brief at 2). The NCAA cited *Flynn v. Board of Trustees*, 1st Dist. Hamilton No. C-060178, 2006-Ohio-6622, but missed the crux of that case. *Flynn* does not stand for the proposition that the discovery rule is limited only to toxic exposure or medical malpractice cases, which is what NCAA argued. Rather, *Flynn* states that "[t]he Ohio Supreme Court has limited the discovery rule to *latent injuries*," *id.* at ¶ 8 (emphasis added), such as those alleged in Plaintiff's Complaint. The *Flynn* court stated that the discovery rule has "generally been more appropriately applied" to cases of medical malpractice and asbestos exposure, *id.*, but did not state the rule was limited to those cases. Also, the NCAA ignores the next few sentences of the court's explanation of the discovery rule's intent: "[t]he discovery rule seeks to redress the unconscionable result reached by a strict application of the limitations period to injured parties whose right to recovery can be barred by the statute of limitation before the party is even aware of an injury's existence. *It is a rule of justice and fairness*." *Id.* (emphasis added) (citation omitted). To the extent the lower court relied upon and credited the NCAA's argument, it committed clear error.

The case *Colby v. Terminix International Co., L.P.* shows that the limitation period on Plaintiffs-Appellant's claims did not begin to run until Steve Schmitz discovered the diagnosis and cause from a competent medical authority. *Colby v. Terminix Int'l Co., L.P.*, 5th Dist. Stark No. 96-CA-0241, 1997 Ohio App. LEXIS 1043, at *6 (Feb. 10, 1997). In *Colby*, the plaintiff developed a symptom, laryngitis, after defendant Terminix sprayed her workplace with chemicals. The plaintiff pursued a specialist after the exposure and laryngitis, and the specialist provided a diagnosis that the plaintiff had developed a chemical sensitivity to the chemicals sprayed by Terminix, which had caused her symptoms. *Id.* at *4-5.

When faced with the question of when the limitation period began to run, the appeals court reversed a grant of summary judgment in favor of the defendant and followed the discovery rule set forth in Ohio's definitive asbestos exposure case, *O'Stricker*. In pertinent part, the appeals court held that a mere suspicion of a connection between a symptom and the cause of a symptom is insufficient to commence the running of the limitation period without a firm diagnosis by a competent medical authority. *See id.* at *8-9. *See also Grimme v. Twin Valley Community Local School Dist. Bd. of Edn.*, 173 Ohio App.3d 460, 466, 2007-Ohio-5495, 878 N.E.2d 1096 (*citing Colby* at *3).

The case of *Williams v. Boston Scientific Corp.*, N.D. Ohio No. 3:12CV1080, 2013 U.S. Dist. LEXIS 43427, at *3 (Mar. 27, 2013) is also on point. In that case, two medical devices were implanted in a plaintiff to treat urinary incontinence in 1998. *Id.* at *1. The plaintiff claimed that the limitations period was not triggered until her physician told her in February 2012 that the defective device likely caused her *symptoms* (that is, when she received a diagnosis from a competent medical authority). *Id.* at *5-6. The court held that under Ohio's discovery rule the fact that "one may have some awareness, or even suspect a connection between the

injury and possible cause does not trigger the statute." *Id.* at *7 (internal citations omitted). The court reasoned that "[n]othing in the allegations as pled suggests, or provides the basis for a fair assumption that [the plaintiff] knew enough in 2008 to connect her occasional stress incontinence with the injuries that the device, according to her complaint, ultimately caused." *Id*

Here, construing all facts from the Complaint as true and all inferences in favor of Plaintiffs-Appellants, *see Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d at 192, 53 N.E.2d 753, it is clear that Steve Schmitz first experienced symptoms of depression and memory loss in or around his mid-fifties, but did not receive a diagnosis of football-related brain damage, specifically CTE, until December 2012, which is well within the limitation period for the claims in this case. The allegations of the Complaint support this set of facts, and Steve Schmitz was not required to plead more. His Complaint pleads facts that if true would give him a right to recover; therefore, the Motions to Dismiss should have been denied.

In an analogous case involving latent brain injuries suffered by professional hockey players, the United States District Court for the District of Minnesota recently denied the defendant National Hockey League's motion to dismiss the players' complaint and allowed the case to proceed to discovery. *See In re NHL Players Concussion Injury Litigation*, D. Minn. MDL No. 14-2551, 2015 U.S. Dist. LEXIS 38755 (Mar. 25, 2015). The players alleged, *inter alia*, that the NHL is responsible for "the pathological and debilitating effects of brain injuries caused by concussive and sub-concussive impacts sustained . . . during their professional careers." *Id.* at *2 (citation omitted). The six named plaintiffs alleged that they suffered numerous concussions and sub-concussive hits while playing hockey over time periods ranging from 1977 through 2008. *Id.* at *3-4 (citations omitted). According to the players, repeated concussions or mild traumatic brain injuries "can trigger progressive degeneration of brain tissue

and can lead to Alzheimer's disease, dementia, and chronic traumatic encephalopathy ("CTE") (a disease caused by the accumulation of toxic protein in the brain)." *Id.* at *4.

The NHL, like the Defendants-Appellees in this case, filed a motion to dismiss and argued, in part, that "the relevant statutes of limitations periods began to run on the dates on which the head injuries that [the plaintiffs] allegedly suffered occurred, and the fact that those injuries may have progressed into more complicated medical conditions does not re-start the limitations period." *Id.* at *13-14 (citation omitted). In response, the players argued that "the injuries at issue are not the discrete head injuries they suffered while playing in the NHL, but rather are the increased risk and development of permanent degenerative brain diseases that resulted from the repeated injuries and 'which arose and of which [the plaintiffs] became aware only after [the plaintiffs] retired from the NHL.'" *Id.* at *14-15 (citations omitted).

The District Court in Minnesota held for the players and denied the NHL's motion. After reviewing the laws of Minnesota, the District of Columbia, and New York (each of which the NHL argued could be applicable to the players' claims), the District Court reasoned as follows:

> Assuming for purposes of this Motion that the NHL has correctly identified which states' statutes of limitations apply to Plaintiffs' claims, it is not clear from the face of the Master Complaint that those limitations periods have run. For example, Plaintiffs have alleged injuries in the form of "an increased risk of developing serious latent neurodegenerative diseases, including but not limited to CTE, dementia, Alzheimer's disease or similar cognitive-impairing conditions"; and latent or manifest neuro-degenerative disorders and diseases"[.] They have further alleged that, for example, "CTE is caused by repeated sublethal brain trauma of the sorts Plaintiffs repeatedly suffered," including sub-concussive impacts that are not diagnosed as concussions and which are sustained by the thousands by NHL players each year[;] and that "brain injury and disease in NHL retirees is a latent disease that can appear years or decades after the player experiences head trauma in his NHL career[.]" Thus, when such injuries "occurred" or "resulted" are matters that cannot be determined from the face of the Master Complaint and are proper subjects of discovery.

Id. at *17-18 (internal citations omitted).

Under the same reasoning, Steve Schmitz's injury did not accrue until he was diagnosed with CTE in December 2012, (Complaint ¶¶ 20-22, 129), and the trial court erred in granting the Motions to Dismiss.

2. Plaintiffs-Appellants Alleged a Latent Undiscoverable Disease that Did Not Manifest Until Decades After Steve Schmitz Was Exposed to Repetitive Head Impacts While Playing Football at Notre Dame.

Defendants-Appellees argued to the trial court, like the NHL did to the District Court, the spurious idea that the concussive or sub-concussive injuries at Notre Dame to which Steve Schmitz was subject but unaware commenced the running of the statute of limitations, and he is now barred from filing suit. The argument is premised on the mistaken notion that the latent brain disease he developed is merely a more expanded version of the concussive and sub-concussive injuries he must have sustained. For this argument, Defendants-Appellees rely on *Pingue v. Pingue*, 5th Dist. Delaware No. 03-CA-E-12070, 2004-Ohio-4173 and other cases, all of which involved criminal assault and battery where the plaintiff later sued for damages for the full extent of a known injury. In every case, the plaintiff-victim knew the identity of the perpetrator, the injury, and the cause of the injury at the time it occurred, but filed suit far beyond the limitation period for the fully developed injury. That is the opposite of what happened here. The discovery rule applies to this case, because (a) Steve Schmitz was exposed to the risk of latent brain disease at Note Dame, (b) was not diagnosed with any head injury in college at all, and (c) his diagnosis decades later is not based on the full extent of a known injury he suffered as a football player.

The Ohio Supreme Court considered and rejected a similar argument in a case involving latent cancer. In *Liddell v. SCA Servs.*, 70 Ohio St.3d 6, 635 N.E.2d 1233, 1994 Ohio LEXIS 1615, at *1 (1994), the plaintiff police officer (employed by the City of East Cleveland)

responded to a report of a truck fire in September 1981. The truck was transporting a hazardous chemical, but was not properly marked. *Id.*at *1. Firefighters hosed down the truck with water, which resulted in an explosion that released a toxic gas cloud. The plaintiff Liddell escorted a school bus full of children to safety through the cloud and was overcome by fumes. He collapsed, went to a hospital, and received treatment for toxic fume inhalation. He reported a scratchy throat, burning, and watery eyes. The symptoms abated, he returned to work, and filed a workers' compensation claim for his medical bills based on the inhalation of fumes. *Id.* at *2. Within nine months, Liddell sustained sinus infections. *Id.* at *2-3. Six years after the accident, a surgeon removed a benign tumor from Liddell's sinus cavity. Soon after the surgery, a biopsy revealed cancer in the nasal cavity. Liddell's physicians advised him that there could be a relationship between the cancer and the toxic exposure. Less than two years after the suggested connection, Liddell filed a negligence claim against the owner of the truck that had caught fire. The truck owner filed a motion for summary judgment that argued Liddell's claim was barred by the applicable two-year statute of limitations in *R.C. 2305.10*. *Id.* at *3. The trial court granted the motion, and the Court of Appeals affirmed, holding that Liddell's cause of action accrued on the date of exposure and not the date he was diagnosed with cancer. *Id.* at *4.

The Ohio Supreme Court reversed. In response to the truck owner's argument that Liddell's cause of action arose on the date of exposure (*id.* at *8), the Ohio Supreme Court applied the *O'Stricker* discovery rule and reasoned as follows:

> Liddell's disease did not manifest itself immediately. Rather, his cancer, and its connection to toxic exposure, went undetected for over six years. Consistent with our reasoning in *O'Stricker*, this case does not represent the circumstances of a plaintiff sitting on his rights. Liddell could not, and did not, discover his injury, the cancer, before the two-year statute of limitations governing bodily injuries had expired. Moreover, had Liddell attempted to bring a cause of action for negligence in 1981, any specification of damages for cancer certainly would have been strongly opposed by SCA on the grounds that they

> were too speculative. Hence, under SCA's theory Liddell would be confronted with a dilemma. He could either meet the statute of limitations more than four years *before* he discovered the disease, or, as he did here, file a claim at the time of discovery, which occurred more than four years *after* the statute of limitations had expired.
>
> A rigid adherence to our procedural rules would place the defendant in a superior position regardless of the alternative chosen by the plaintiff. We cannot countenance such a rigid application of the statute of limitations here. Given the policy considerations underlying our discovery rule decisions it is not unfair to expect the defendant to defend this type of action. Rather, the procedural dilemma confronting a plaintiff in cases where a long latency conflicts with a short statute of limitations provides the plaintiff with only an illusory opportunity to litigate his or her claim. Under these circumstances, to deny the plaintiff a genuine opportunity to pursue a cause of action against a defendant now is patently unfair.

Id. at *13.

Following *Liddell*, even if Steve Schmitz had recognized that he suffered an immediate and apparent injury while playing football at Notre Dame—which he did not—Plaintiffs-Appellants' claim cannot be barred by Ohio's two-year statute of limitations. Here, Steve Schmitz did not—and could not—know that he would be diagnosed decades after college with brain disease caused by football. Not until Steve Schmitz received the diagnosis from the Cleveland Clinic in December 2012 did the two-year limitations period begin to run on his claims.

Like the defendant in *Liddell*, Defendants-Appellees in this case would like to impose an absurd rule that would have required Steve Schmitz to file a claim decades before he knew he had any brain disease at all, specifically latent brain disease caused by football. If Defendants-Appellees proposed rule were adopted by this Court, it would require Steve Schmitz to have filed a lawsuit at a time when he was unaware of any injury and had no recognizable and diagnosed symptoms with which to prove a case. This is contrary to the law of Ohio as set forth in *Liddell* and *O'Stricker* and the other cases cited above that are consistent with that jurisprudence.

For those reasons, *Pingue v. Pingue* does not apply here. To the extent the trial court credited that case and others like it - and it appears that they form the basis for the trial court's ruling - the trial court erred.[2] Those cases address physical assault and battery that the victim recognized as injurious, wrongful, and harmful at the time it occurred. In every case, there was no reasonable dispute that the injured victim knew the identity of the perpetrator, understood that the conduct was wrong and harmful, and knew that an injury had taken place.

Other cases the Defendants-Appellees cited in their Motions do not apply. In, for example, *Flynn v. Bd. of Trustees of Green Twp.*, 2006-Ohio-6622, ¶ 1, 7, cited in the Notre Dame Memorandum at 7-9 and the NCAA Memorandum at 9, a case involving a slip and fall caused by a latent defect, the plaintiff recognized the injury immediately, understood the cause of the alleged harm, and could ascertain the person or entity responsible. In *Swanson v. BSA*, 4th Dist. Vinton No. 07CA663, 2008-Ohio-1692, at ¶ 2, 14, NCAA Memorandum at 8, plaintiff's injury resulted from a fall, but the plaintiff recognized the injury at the time it happened (there was nothing latent involved) and understood the alleged misconduct.[3]

---

[2]For example, at page 10 of its Memorandum in support of the Motion to Dismiss, Notre Dame cites *Clay v. Kuhl*, 189 Ill. 2d 603, 727 N.E.2d 217 (Ill. 2000). That sexual abuse case is irrelevant here, because the plaintiff knew the perpetrator and the harm at the time it occurred and knew it was wrongful. *Id.* at 605, 611. Also, unlike the lower court's error here, the decision in *Clay* was the grant of a summary judgment motion after discovery. *Id.* at 605-06. The *Clay* Court noted that *Clay* was a case in which the events at issue gave rise to an immediate awareness of injury, which is distinct from cases in which the risk of harm is not immediately apparent. *Id.* at 612. To the extent the lower court relied on *Clay* or any other assault and battery case to grant the Motions to Dismiss, the lower court erred.

[3] The same is true with respect to *Baxley v. Harley-Davidson Motor Co.*, a products liability case cited by Defendants-Appellees in their Motions. The case, which is cited in the Notre Dame Memorandum at 8-9 and the NCAA Memorandum at 6, 10, involved injury from a motorcycle crash in which the plaintiff suffered immediate harm to his leg, ankle and foot. There was no dispute that the motorcycle caused harm (*i.e.*, "the causal link was obvious"). *Baxley v. Harley-Davidson Motor Co.*, 172 Ohio App.3d 517, 519-520, 2007-Ohio-3678, 875 N.E.2d 989; *see also Thomas v. Galinsky,* 11th Dist. Geaugu No. 2003-G-2537, 2004-Ohio-2789, ¶ 2, 16, another products liability case that also arose out of a motor vehicle accident, did not involve the

This case is completely different. Steve Schmitz alleges that neither he nor the Defendants recognized a head injury of any kind to Steve Schmitz when he played football. Not until he was diagnosed by the Cleveland Clinic did he know that he had latent brain disease caused by football. (Complaint ¶¶ 19-22, 129). Steve Schmitz also alleges that the Defendants-Appellees never recognized an injury to himself or other Notre Dame players (*Id.* at ¶¶ 65-68), despite Defendants-Appellees' knowledge of the risks. (*Id.* at ¶¶ 38-42, 125, 135-136). To the contrary, the Complaint alleges a latent debilitating brain disease diagnosed decades after Steve Schmitz left college. (*Id.* at ¶¶ 19-20, 129). He never sustained a criminal attack, never rode a motorcycle that had a defective part, and never ingested a defective medication. To the contrary, Steve Schmitz led a normal life for decades until symptoms arose that, after diligent investigation, a competent medical authority diagnosed as CTE.

At no point does the Complaint ever assert that Steve Schmitz knew of or recognized the sub-concussive and concussive impacts he sustained were an injury. In fact, it says the opposite. (Complaint ¶ 65 ("At no time . . . were the symptoms that Steve Schmitz demonstrated recognized . . . by him . . . as an injury"), and ¶ 68 ("At no time while Steve Schmitz played football at Notre Dame did . . . he . . . recognize that [he] sustained an injury to the head.")).

3. Plaintiffs-Appellants' Fraud Claims Are Not Barred by Ohio's 4-Year Statute of Limitations.

The fraudulent concealment claim and constructive fraud claims are not barred by Ohio's four-year statute of limitations. Under R.C. 2305.09 of Ohio Revised Code Annotated, the applicable statute of limitations does not begin to run until the fraud has actually been discovered

---

discovery rule, and turned on the proper time period computations under Ohio Civ. R, 6(A) and *Braxton v. Peerless Premier Appliance Co.*, 8th Dist. No. 8185, 2003-Ohio-2872, ¶ 1, 5, 8. Both cases involved an alleged product defect that resulted in "an immediate injury," where the plaintiff knew the cause and the defendant immediately.

or should have been discovered. *Doyle v. Ohio Co.*, 2nd Dist. Clark No. 94-CA-16, 1994 Ohio App. LEXIS 3986, at * 6 (Sept. 9, 1994) (citing *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 181, 54 N.E.2d 206 (1989)). Because injury is an element of fraudulent concealment, *see Doyle, supra*, and Steve Schmitz's injury and cause could not have been known until in or around December 2012, the claim for fraudulent concealment was filed well within the applicable four-year statute of limitations.

4. Plaintiffs-Appellants' Contract Claims Are Not Barred by Ohio's 15-Year Statute of Limitations.

The contract claims are also not time-barred. Ohio courts have considered applying the discovery rule to breach of contract claims. *See Settles v. Overpeck Trucking Co.*, 12th Dist. Butler No. CA93-05-083, 1993 Ohio App. LEXIS 6217 (Dec. 27, 1993) (analyzing the discovery rule under a breach of contract claim, but ultimately holding that the record did not support the tolling of the statute). At least one Ohio court kept open the possibility that a contract claim could benefit from the discovery rule if the injury complained of, like the one here, may not become manifest immediately. *Pomeroy v. Schwartz*, 8th Dist. No. 99638, 2013-Ohio-4920, ¶ 40 *appeal not allowed*, 2014-Ohio-1182.

Here, the Complaint alleges that the Defendants-Appellees unequivocally made an agreement with Steve Schmitz, express, implied, or both, that required them to protect his health and safety and implement appropriate procedures and protocols regarding sub-concussive and concussive impacts. (Complaint ¶¶ 9, 28, 44-57, 155-158, 165-167, 173-176). The Complaint also alleges that the Defendants-Appellees breached the agreement. (*Id.* at ¶¶ 2, 58-68, 102-105, 159-161, 168-170, 177-180). The injury to Steve Schmitz, by its nature, was latent and undiscoverable until much later in life. Where "fairness necessitates allowing the assertion of a claim when discovery of the injury occurs beyond the statute of limitations," *Pomeroy*, 2013-

Ohio-4920, ¶ 40, it is reasonable to apply the discovery rule to the contract claims in this Complaint, and the lower court erred by dismissing the claim based on a Motion to Dismiss that argued a statute of limitations defense.

For these reasons, it is equitable in this case to toll the statute of limitations period until Steve Schmitz discovered his symptoms and a competent medical professional diagnosed the injury and cause.

C. The Trial Court Erred in Dismissing the Complaint Where Plaintiffs-Appellants Plead Sufficient Facts to State Each Claim Under the Law of Ohio and/or Indiana.

To the extent the trial court made its ruling on some basis other than the statute of limitations, the trial court erred in dismissing the Complaint where it pleads sufficient facts to support each claim. *See, e.g., Ohio Assn of Pub. School Emps.,* 2004-Ohio-7101 at ¶ 42.

1. The Negligence Claim is Sufficient Where the Complaint Adequately Alleges That Both Defendants-Appellees Owed a Duty to Steve Schmitz.

The NCAA contends that the substantive law of Indiana rather than Ohio applies to this case.[4] The elements of negligence, however, do not differ under the laws of either Ohio or Indiana. Under both states' laws, a plaintiff must show: (1) a duty; (2) breach of that duty; and (3) injury that was proximately caused by the breach of duty. *See, e.g., Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 274, 2002-Ohio-4210, 773 N.E.2d 1018 (citation omitted); *see also, e.g., Ind. & Chicago Coal Co. v. Neal*, 166 Ind. 458, 460, 77 N.E. 850 (1906) (citation omitted). In its Motion to Dismiss, the NCAA argued that Plaintiffs-Appellants' negligence claim should be dismissed because they did not allege a duty recognized by law. As set forth in the Complaint

[4] In their Motion to Dismiss, Notre Dame did not assert that any law other than Ohio law applies. Nor did it challenge the sufficiency of Plaintiffs-Appellants' negligence claim beyond its statute of limitations argument. (Notre Dame Memorandum of Law at 5-23; Notre Dame Reply Brief at 3-12).

and shown below, under either Indiana or Ohio law the Complaint alleges a duty shouldered by the NCAA to Steve Schmitz.

"Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff." *Wallace* at 274 (citation omitted). The Ohio Supreme Court has "often stated that the existence of a duty depends upon the foreseeability of the harm; if a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied." *Id.* (citations omitted). The Court has also stated that the duty element "may be established by common law, by legislative enactment, or by particular circumstances of a given case." *Id.* (citations omitted). The Ohio Supreme Court has further stated that

> [t]here is no formula for ascertaining whether a duty exists. Duty is the court's expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall.

Id. (internal citations and quotation marks omitted).

The analysis of duty under Ohio law does not conflict with the three-factor test established by the Indiana Supreme Court in *Webb v. Jarvis*: (1) the relationship between the parties; (2) the reasonable foreseeability of the harm to the person injured; and (3) public policy concerns. *Webb v. Jarvis,* 575 N.E.2d 992,995 (Ind. 1991).

Here, the Complaint adequately alleges a duty under both Ohio and Indiana law and it states a claim under the assumed duty test set forth in *Yost v. Wabash:* "The assumption of such

a duty requires affirmative deliberate conduct . . . performed negligently." *Yost v. Wabash,* 3 N.E.3d 509, 517 (Ind. 2014) (citations omitted).

a. The Complaint Alleges a Substantial Relationship Between the NCAA and Steve Schmitz.

The Complaint alleges a substantial relationship between the NCAA and Steven Schmitz, which supports the existence of the duty. A court in Pennsylvania recently considered the relationship between the NCAA and a former college football player in a similar case involving long-term brain injury resulting from repeated head impacts. *See Onyshko v. NCAA*, No. 2014-3620, Common Pleas of Washington County, Pennsylvania, Order at 3 (Dec. 4, 2014), attached as Exhibit C to the Appendix. In overruling the NCAA's preliminary objections, the Pennsylvania court found that "plaintiffs have specifically identified at least four possible theories for the existence of a duty," which included the NCAA's: (1) failure in its undertaking to provide adequate educational and safety standards for student athletes relating to long term head impacts, (2) failure in its undertaking to assist member institutions in protecting student athletes, (3) assumption of duty to student athletes by undertaking to act as a leader in providing "healthy and safe" environments, and (4) assumption of duty owed to student athletes of member institutions to formulate safety guidelines. *Id.* at 2. In so ruling, the Pennsylvania court recognized that "[a]lthough the NCAA does not 'recruit' athletes it does actively seek – and benefit from – their participation in a variety of ways including advertising, merchandise sales, and television contracts." *Id.* at 3.

This finding is equally true when applied to the relationship between the NCAA and Steve Schmitz. The Complaint specifically alleges that the NCAA, since its inception in 1906, identified its own purpose as the protection of student athletes. (Complaint ¶¶ 44-50). The Complaint alleges that an NCAA official stated in 1909 that: "The lives of the students must not

be sacrificed to a sport. Athletic sports must be selected with strict regard to the safety of those practicing them." (*Id.* at ¶ 46).

According to the Complaint, the NCAA has served as the main supervisor of safety and health across all of college football for many decades. The NCAA states on its website that it was founded "to protect young people from the dangerous and exploitive athletic practices of the time" and that its "core mission is to provide student athletes with a competitive environment that is safe and ensures fair play." (*Id.* at ¶ 48). The Complaint alleges that the NCAA expresses this duty explicitly in the NCAA Constitution which states the "Principle of Student Athletes Well Being," which contains a specific provision on health and safety. (*Id.* at ¶ 51).

The Complaint also alleges that the NCAA has specifically formulated and implemented regulations as to player safety in college football and publishes a Sports Medicine Handbook for the treatment and prevention of sports-related injuries. (*Id.* at ¶¶ 54-56). The NCAA Handbook allegedly states: "student athletes rightfully assume that *those who sponsor intercollegiate athletes have taken reasonable precautions to minimize the risk of injury* from athletic participation." (*Id.* at ¶ 54 (emphasis added)).

These allegations are more than adequate to set forth the "relationship" requirement of *Webb v. Jarvis* in establishing the existence of NCAA's duty to the college football player. They also demonstrate a substantial, if not absolute, level of the NCAA's direct participation, control, and oversight of college football health and safety, and thus meet the standards of *Yost* for a sufficient relationship to support an assumed duty. *Yost*, 3 N.E.3d at 517.

Assuming the facts as alleged are true, the NCAA's own words, public proclamations, Constitution, and bylaws articulate its specific duty to protect the health and safety of college

football players (including the late Steve Schmitz). Thus, under the allegations of the Complaint, the NCAA has specifically admitted to this duty.

b. The Complaint Adequately Alleges the Foreseeability Factor.

The Complaint also sufficiently alleges the foreseeability factor. The Complaint alleges that Steve Schmitz was a foreseeable plaintiff who suffered a foreseeable harm and that the NCAA has known for decades that college football was particularly dangerous with respect to sub-concussive and concussive impacts. (Complaint ¶¶ 36-41, 69-87).

The Complaint also alleges that the NCAA was in a superior position with respect to health and safety issues to the foreseeable plaintiffs, college football players like Steve Schmitz. (*Id.* at ¶¶ 6-9, 38-41, 125, 149). The NCAA knew or should have known the published medical and scientific literature describing risk of latent brain disease associated with football. (*Id.* at ¶ 76 ("[in 1952] an article published in the *New England Journal of Medicine* recommended a three-strike rule for concussions in football (*i.e.*, recommending that players cease to play permanently after receiving a third concussion."); *see also* Complaint ¶¶ 69-87)). The NCAA was clearly aware that Steve Schmitz was at risk from sub-concussive and concussive head impacts. (Complaint ¶¶ 4-10, 40-43).

Further, even after Steve Schmitz graduated from Notre Dame, the Complaint alleges that the NCAA gathered more and more specific information on the latent brain injury risks to college football players, but never reached out and informed its former players so that they could become aware of the dangers and could take steps to mitigate the adverse health effects. (*Id.* at ¶¶ 100-102, 106).

Thus, the Complaint readily meets the foreseeability factor necessary to establish the NCAA's duty. *Webb*, 575 N.E.2d at 997.

c. The Complaint Satisfies the Public Policy Factor.

The Complaint also meets the public policy factor. The Complaint alleges that the NCAA's own words, public proclamations, Constitution, and bylaws are a frank admission of its duty to Steve Schmitz. (Complaint ¶¶ 44-56). The public policy of preventing and mitigating devastating latent brain disease in college football players is obvious from the Complaint's damages allegations. (*Id.* at ¶ 129 ("The latent injuries sustained by Steve Schmitz [total disability at age 58 and a diagnosis of Chronic Traumatic Encephalopathy ("CTE")] developed over time and were manifest later in life."); *see also id.* at ¶¶ 11, 39-41, 129-130).

The State of Ohio has a clear interest in preserving the health and safety of its college athletes, especially football players who are routinely exposed to the risks of latent brain injury. Thus, for purposes of its underlying Motion to Dismiss, the NCAA cannot deny that this factor supports the existence of an NCAA duty to Steve Schmitz.

The Complaint also properly pleads an assumed duty or a voluntary undertaking. (*Id.* at ¶¶ 42-56). Under Indiana law, a plaintiff may state a claim for a duty arising from a voluntary undertaking in several ways. *City of Muncie Fire Dept. v. Weidner*, 831 N.E.2d 206, 212 (Ind. App. 2005) (an assumed duty exists based on an allegation that the defendant's "failure to exercise reasonable care increases the risk of such harm," or an allegation that "the harm is suffered because of reliance . . . upon the undertaking."); *Yost*, 3 N.E.3d at 517 (An assumed duty exists based on allegation of "affirmative deliberate conduct," performed negligently.). The assumption of a duty and the extent of it are questions for the fact-finder, and thus not ever amenable to a motion to dismiss where the plaintiff has made adequate allegations. *City of Muncie* at 213.

In the Complaint, there are multiple allegations that meet this requirement, such as those alleging that the NCAA's failure to exercise reasonable care increased Steve Schmitz's risk of the latent disease of CTE (Complaint ¶¶ 10, 98, 121), and those alleging that the harm Steve Schmitz suffered was due to his reliance on the NCAA's negligent undertaking of a health and safety duty, (*Id.* at ¶¶ 124, 138-139, 149-150).[5]

The Complaint also alleges deliberate conduct by the NCAA in negligently carrying out its undertaking of health and safety protection for college football players. (*Id.* at ¶¶ 58, 102-107, 121-123). The Complaint makes clear that all college football players such as Steve Schmitz, whether adults or not, have been put at severe risk of latent brain injury because of their specific relationship with the NCAA, the entity in charge of college football safety, and because of the NCAA's direct participation and control of college football safety. (*Id.* at ¶¶ 9, 56-58, 116-117). Thus, the Complaint also adequately alleges an NCAA duty under the doctrine of an assumed duty or voluntary undertaking under Indiana law.

d. The Complaint Adequately Alleges a Duty Owed by Notre Dame.

As a member institution of the NCAA, Notre Dame was at all relevant times charged with implementing and enforcing the health and safety policies of the NCAA in a meaningful way. (Complaint ¶¶ 57, 116-118). Notre Dame breached that duty to Steve Schmitz by, among other things, (a) doing nothing to mitigate the risks of latent brain disease and (b) even worse, purposefully aggravating the situation by teaching and demanding that Notre Dame football players use their helmets as weapons and inflict head injuries on each other and their opponents. (*Id.* at ¶¶ 59-68, 121-23).

---

[5] The *Onyshko* court, for example, specifically rejected the NCAA's objections and found the complaint adequately pled a breach of a duty arising from an undertaking by the NCAA to provide a "healthy and safe" environment for college football players. *Onyshko*, Order at 2. (Appendix C).

2. The Claim for Fraudulent Concealment is Recognized Under Indiana and/or Ohio Law.

According to the NCAA, Indiana law will apply here. Contrary to the NCAA's assertion, both Indiana and Ohio law recognize fraudulent concealment as a cause of action, and the Complaint properly pleaded the claim.[6]

The elements of a claim of fraudulent concealment (or fraud by concealment) are similar to fraud. Under Indiana law, for example, the elements of fraud are as follows:

> (1) the fraud feasor must have made at least one representation of past or existing fact; (2) which was false; (3) which the fraud feasor knew to be false or made with reckless disregard as to its truth or falsity; (4) upon which the plaintiff reasonably relied; (5) and which harmed the plaintiff.

Wright v. Pennamped, 657 N.E.2d 1223, 1230 (Ind. App. 1995) (citation omitted) (recognizing under Indiana law a fraud claim against a lawyer who had a duty to disclose to the opposing lawyer and party a material change he made to a transactional document). Although silence generally will not support a claim for fraud, Indiana recognizes an actionable claim for fraudulent concealment, where there is a "duty to speak or to disclose facts." *See id.* at 1231 (citations omitted).

Under Indiana law, the failure of a party to disclose material facts, when the law imposes a duty to disclose, constitutes actionable fraud. *See Loer v. Neal,* 127 Ind. App. 246, 254-55, 137 N. E.2d 728 (Ind. App. 1956) (citation omitted); *Allen Realty Co. v. Uhler,* 83 Ind. App. 103, 107, 146 N.E. 766 (Ind. App. 1925) (citations omitted). *See also Wright* at 1230-32 (citation omitted). The duty to disclose is often assumed by the party who is in a dominant position under

---

[6] The Complaint does not plead fraudulent concealment as an equitable doctrine to toll the statute of limitations. Rather, the Complaint alleges that Defendants-Appellees fraudulently and knowingly concealed from NCAA football players generally, and Steve Schmitz specifically, the risks of head injuries and concussions, including the later in life consequences, and that as a direct and proximate result of such concealment, Steve Schmitz has suffered and will continue to suffer substantial injuries. (*See* Complaint ¶¶ 133-141).

the circumstances of a relationship. *See, e.g. Peoples Trust & Sav. Bank v. Humphrey*, 451 N.E.2d 1104, 1112 (Ind. App. 1983). The instances in which the duty exists, and in which a concealment is therefore actionable, include fiduciary relationships, as well as,

> instances in which there is no existing special fiduciary relation between the parties, and the transaction is not in its essential nature fiduciary, but it appears that either one or each of the parties, in entering into the contract or other transaction expressly reposes a trust and confidence in the other; or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied.

Id. (citation omitted).

The law of Ohio is similar. A defendant can be liable for a material omission if he has a duty to disclose the information. *Koyo Corp. of USA v. Commercial Bank,* E.D. Ohio No. 10CV2557, 2011 U.S. Dist. LEXIS 111880, at *19 (Sept. 29, 2011) (citing *Schulman v. Wolske & Blue Co., L.P.A.,* 125 Ohio App.3d 365, 708 N.E.2d 753, 758 (10th Dist. 1998)). A claim under Ohio law based on concealment must allege an underlying duty to disclose, which arises where there is relationship in which "one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Spears v. Chrysler, LLC,* S.D. Ohio No. 3:08-cv-331, 2011 U.S. Dist. LEXIS 12014, at *27 (Feb. 8, 2011) (*quoting Central States Stamping Co. v. Terminal Equip. Co., Inc.,* 727 F.2d 1405, 1409 (6th Cir. 1984)).

The Complaint here alleges that the NCAA voluntarily assumed a duty to Steve Schmitz and every other football player at NCAA member institutions to protect their health and safety. (Complaint ¶¶ 44-56). As a member institution of the NCAA charged with implementing health and safety measures, Notre Dame also assumed a duty to protect the health and safety of Steve Schmitz. (*Id.* at ¶¶ 28, 57). The Complaint alleges that both Defendants-Appellees were in a superior position of knowledge to Steve Schmitz and knew the serious risk of latent brain injury

associated with the head impacts to which Notre Dame football players were exposed. (*Id.* at ¶¶ 125, 134-135, 138).

The Complaint also alleges that Notre Dame had the power to impose (or not to impose) proper health and safety protocols, whereas Steve Schmitz had no such power. (*Id.* at ¶¶ 18, 28). The NCAA and Notre Dame, according to the Complaint, concealed from Steve Schmitz the neurological health risks he was taking by failing to inform him. (*Id.* at ¶ 136). The Complaint also alleges that Steve Schmitz relied on Notre Dame for guidance on all health-related subjects, including risks of neurological damage from which he suffered and died. (*Id.* at ¶¶ 124, 138, 149). The Complaint alleges that "[b]ecause such information was not readily available to Steve Schmitz, the Defendants knew or should have known that Steve Schmitz would act and rely upon the guidance, expertise, and instruction of the Defendants on this crucial medical issue, while at Notre Dame and thereafter." (*Id.* at ¶ 125). As such, the Complaint alleges that "[b]oth Defendants had a duty not to conceal material information from Notre Dame football players, including Steve Schmitz." (*Id.* at ¶ 120).

The Complaint alleges that, notwithstanding its knowledge of the risks, Notre Dame actually fostered and condoned a technique of blocking, running, and tackling that perpetrated sub-concussive and concussive head impacts on its players. (*Id.* at ¶¶ 60-63).

Comparing the caselaw with the allegations of the Complaint, both Indiana and Ohio recognize fraudulent concealment as a cause of action, and Plaintiffs-Appellants have properly pleaded that claim in the Complaint. For all of the foregoing reasons, the lower court erred when it dismissed the fraudulent concealment claim.

3. The Constructive Fraud Claim was Plead with Requisite Particularity.

Under Indiana law (the law the NCAA[7] urged the trial court to apply), the elements of constructive fraud are:

> (i) a duty owing by the party to be charged to the complaining party due to their relationship; (ii) violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists; (iii) reliance thereupon by the complaining party; (iv) injury to the complaining party as a proximate result thereof; and (v) the gaining of an advantage by the party to be charged at the expense of the complaining party.

Rice v. Strunk, 670 N.E.2d 1280, 1284 (Ind. 1996) (citation omitted). Here, the Complaint alleges that "Defendant NCAA . . . had a duty to protect [its] student athletes." (Complaint ¶ 143). "This duty arose by virtue of the contractual relationships set forth in [Plaintiffs-Appellants' Breach of Contract Counts], as well as the unique relationship between . . . Steve Schmitz and the NCAA, which, among other things, regulated Steve Schmitz's participation in" football. (Complaint ¶ 144). The Complaint also alleges that "[a]s a result of these relationships, the NCAA . . . [was] in a unique position to take unfair advantage of Plaintiff Steve Schmitz." (*Id.*).

The Complaint's specific description of the special relationship involving NCAA's superior knowledge and duty to warn Steve Schmitz, as well as Steve Schmitz's reliance on the NCAA's superior and unique vantage point is set forth clearly. (*Id.* at ¶¶ 145-146, 149). The Complaint specifically "incorporate[d] by reference as if fully set forth [t]herein paragraphs 1 through 141" of the Complaint in the Constructive Fraud Count. (*Id.* at ¶ 142). Regarding the special relationship requirement, the Complaint alleges that since inception, the NCAA identified its own purpose as the protection of student athletes. (*Id.* at ¶¶ 44-56). Since its inception, the NCAA has served as the main supervisor of safety and health across all of college football. The

[7] Notre Dame did not challenge the constructive fraud claim in the lower court.

NCAA states on its website that it was founded "to protect young people from the dangerous and exploitive athletic practices of the time." (*Id.* at ¶ 48). The NCAA's "core mission is to provide student athletes with a competitive environment that is safe and ensures fair play." (*Id.*). This duty is explicitly expressed in the NCAA Constitution which states the "Principle of Student Athletes Well Being," and contains a specific provision on health and safety. (*Id.* at ¶ 51).

Further, the NCAA Handbook states: "student athletes rightfully assume that *those who sponsor intercollegiate athletes have taken reasonable precautions to minimize the risk of injury* from athletics participation." (Complaint ¶ 54 (emphasis added)).

The Complaint, therefore, alleges with particularity the circumstances constituting the fraud or mistake in accordance with Ohio Rule of Civil Procedure 9(B), and the trial court erred in dismissing the constructive fraud claim.

4. The Breach of Express Contract Claim is Sufficient Against both the NCAA and Notre Dame.

The lower court erred by dismissing the breach of express contract claims. Under Ohio law, the elements of a claim for breach of contract: (1) that a contract existed; (2) that the plaintiff fulfilled his obligations; (3) that the defendant failed to fulfill his obligations; and (4) that damages resulted from this failure. *E.g.*, *Lawrence v. Lorain Cty. Community College*, 127 Ohio App.3d 546, 549, 713 N.E.2d 478 (9th Dist. 1998). Similarly, to state a claim for a breach of contract action under Indiana law, a plaintiff must allege the existence of a contract, the defendant's breach, and damages. *E.g.*, *McCalment v. Eli Lilly & Co.,* 860 N.E.2d 884, 894 (Ind. App. 2007) (citation omitted).

In its Motion to Dismiss, the NCAA disputed the first element—the existence of a contract between Steve Schmitz and the NCAA.[8] Under both Ohio and Indiana law, however, the essential elements of a contract include an offer, acceptance, manifestation of mutual assent, and consideration. *E.g.*, *Modern Office Methods, Inc. v. Ohio State Univ.*, 10th Dist. No. 11Ap-1012, 2012-Ohio-3587, ¶ 15, 975 N.E.2d 523; *McIntire v. Franklin Twp. Community School Corp.*, 15 N.E.3d 131, 134 (Ind. App. 2014). In this case, Steve Schmitz was a student-athlete at Notre Dame. (Complaint ¶ 155). As an NCAA member institution, Notre Dame is governed by the rules and regulations of the NCAA. (*Id.*). As alleged in the Complaint, the regulations required Steve Schmitz to enter into a contract with the NCAA. (*Id.*).

Steve Schmitz signed a form, and by doing so, acknowledged that he read the NCAA's regulations and applicable NCAA Division manual. (*Id.*). By signing the form, he also acknowledged awareness that the NCAA Division manual encompassed the NCAA Constitution, Operating Bylaws and Administrative Bylaws. (*Id.*). By signing the form, Steve Schmitz acknowledged his agreement to abide by the NCAA Division bylaws. (*Id.*).

Contrary to the NCAA's argument to the trial court, the Complaint does not allege that the "form" was itself the "contract." Rather, it was part of the contract. The NCAA created the form and its terms and provided them to Steve Schmitz. By providing the form to Steve Schmitz and requiring that he sign it, the NCAA manifested assent to the contract when Steve Schmitz signed it. *L & M of Stark Cty., Ltd. v. Lodano's Footwear, Inc.,* 5th Dist. Stark No. 2006CA00091, 2006-Ohio-5997, ¶ 70 ("Generally, courts presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement") (*citing Shifrin v.*

[8] In its Motion to Dismiss, Notre Dame did not challenge the existence of the contract or suggest that Plaintiffs-Appellants failed to plead a prima facie case of breach of contract; rather, Notre Dame only asserted that the breach of contract claim is barred by the statute of limitations, which was addressed, *infra*.

Forest Ents., Inc., 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992) (citations omitted)). *See also Indiana Bur. of Motor Vehicles v. Ash, Inc.*, 895 N.E.2d 359, 366 (Ind. App. 2008) (citation omitted).

For those reasons, the Complaint sufficiently pleaded that the NCAA agreed to be bound by the terms of the contract, and by signing the form, Steve Schmitz agreed as well. In its Motion to Dismiss, the NCAA also pointed to the fact that the form was not attached to the Complaint. Although Ohio Rule of Civil Procedure 10(D)(1) normally requires that the plaintiff in a breach of contract claim attach a copy of the written instrument in question to the Complaint, the plaintiff can plead a prima facie case without attaching a written agreement to the complaint. *Fletcher v. Univ. Hosps. of Cleveland,* 120 Ohio St.3d 167, 170, 2008–Ohio–5379, 897 N.E.2d 147; *see also Keenan v. Adecco Emp. Servs., Inc.,* 3d Dist. Allen No. 11-06-10, 2006-Ohio-3633, ¶ 15, n.1 (Civil Rule 10(D)(1) permits the "claim even if she does not have the written instrument in question, after which she is certainly entitled to obtain the instrument through discovery"). Even if the written instrument is not attached, a plaintiff can satisfy 10(D)(1) by providing an explanation for failing to attach the agreements in question. *Keenan* at ¶ 15, n.1. Here, the Complaint alleges that Plaintiffs-Appellants are not in possession of the form, and upon information and belief, either or both Defendants-Appellees have a copy of the form or one substantially similar. (Complaint ¶ 163). Ohio case law supports Plaintiffs-Appellants' contention that a valid reason for not attaching a copy of the written instrument would be that they do not have a copy of the instrument in their possession and are unable to obtain a copy. *Hodges v. Byars,* 2nd Dist. Montgomery No. 12839, 1992 Ohio App. LEXIS 2742, at *5 (May 28, 1992) (noting plaintiff "tried to rectify the error when he filed an amendment to the complaint and attached a copy of the contract" and alleged that defendants "had the original

contract in their possession and . . .refused to provide [plaintiff] with a copy"). Accordingly, Plaintiffs-Appellants sufficiently pleaded the existence of a contract

5. The Breach of Implied Contract Claim Against the NCAA is Sufficient.

The Complaint sufficiently pleads a claim for breach of implied contract against the NCAA, and the lower court erred by dismissing the claim. Under Ohio law, an implied-in-fact contract exists when "the circumstances surrounding the parties' transaction make it reasonably certain that an agreement was intended." *Stepp v. Freeman*, 119 Ohio App.3d 68, 74, 694 N.E.2d 510 (1997) (citation omitted). The parties' assent and agreement is inferred from the surrounding circumstances, including the conduct and declarations of the parties. *Id.; see also Campanella v. Commerce Exchange Bank*, 139 Ohio App.3d 796, 806, 745 N.E.2d 1087 (8th Dist. 2000) (citation omitted). Similarly, Indiana law provides that a contract implied-in-fact "arises out of acts and conduct of the parties, coupled with a meeting of the minds and a clear intent of the parties in the agreement." *J.W. v. Hendricks Cty. Office of Family & Children*, 697 N.E.2d 480, 484 (Ind. App. 1998).

In this case, the NCAA Division manual expressly encompasses the NCAA Constitution, Operating Bylaws, and Administrative Bylaws. (*See* Complaint ¶ 155). There is no requirement for the Complaint to allege that the parties intended these parts to constitute an implied contact, because an implied contract consists of obligations that arise from mutual agreement and intent to promise, when the agreement and promise have not been expressed in words. *J.W. v. Hendricks Cnty.* at 484; *see also Legros v. Tarr*, 44 Ohio St.3d 1, 7, 540 N.E.2d 257 (1989) ("the surrounding circumstances . . . made it inferable that the contract exists as a matter of tacit understanding"); *Lucas v. Costantini*, 13 Ohio App. 3d 367, 369, 469 N.E.2d 927 (1983) (On the contrary, express contracts "connote[] a more formal exchange of promises where the parties

have communicated in some manner the terms to which they agree to be bound"); *JKL Components Corp. v. Insul-Reps, Inc.*, 596 N.E.2d 945, 951 (Ind. App. 1992) ("A contract implied in fact derives from the 'presumed' intention of the parties as indicated by their conduct.") (citation omitted).

Steve Schmitz played football and promised to perform in accordance with the rules and regulations of the NCAA, some of which were expressly outlined in the NCAA Division manual, which encompassed the NCAA Constitution, Operating Bylaws and Administrative Bylaws. At the same time, the NCAA agreed to perform in accordance with the promises arising by the very nature of the relationship between the NCAA and student-athletes at NCAA member institutions (i.e., Notre Dame). The NCAA controls that student-athlete by express and implied agreement, and the NCAA also promises to protect the health and safety of that student-athlete. (*See* Complaint ¶¶ 44-56, 156).

The NCAA breached the contract because it failed to provide an environment that reasonably protected the health and safety of Steve Schmitz as an amateur football player and failed to educate Steve Schmitz on the latent brain injury risks to which he was exposed. The NCAA, therefore, breached the duties it pledged to perform under the terms of its own Constitution, Operating Bylaws, and Administrative Bylaws. (*See* Complaint ¶¶ 155, 168-169). The Complaint also alleges conduct and a relationship of the parties that show a meeting of the minds. That is, Plaintiff Steve Schmitz would abide by all NCAA rules and regulations, and the NCAA (and Notre Dame) would perform in accordance with the terms of the NCAA Constitution, Operating Bylaws, and Administrative Bylaws. (Complaint ¶ 167).

Steve Schmitz, however, was the only party that performed. The NCAA (and Notre Dame) failed to provide the protections they promised. Accordingly, the Complaint sufficiently established Defendants-Appellees' breach of the implied terms thereof.

6. The Loss of Consortium Claim is Sufficient.

Finally, because Plaintiffs-Appellants sufficiently pleaded cognizable torts against Defendants-Appellees, the trial court erred in dismissing Yvette Schmitz's loss of consortium claim. *See, e.g., Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 93, 585 N.E.2d 384 (1992).

CONCLUSION

Ohio law is clear on the issue that confronted the trial court earlier this year: the discovery rules applies where a plaintiff (Steve Schmitz) was exposed to an elevated risk of latent disease and injury and only discovered that latent injury many years later through manifest symptoms and diagnosis from a competent medical authority. Only then did Steve Schmitz's claims accrue against the Defendants-Appellees, and only then did the limitations periods for those claims begin to run. The lower court, therefore, erred when it granted the Motions to Dismiss on the basis on the statute of limitations. The trial court also erred in dismissing the Complaint where Plaintiffs-Appellants plead specific facts to support each claim. For these reasons, Plaintiffs-Appellants respectfully urge this Court to reverse the judgment of Cuyahoga County Court of Common Pleas and remand the case for discovery and further proceedings.

Dated: December 11, 2015

Respectfully Submitted,

/s/ Robert E. DeRose
Robert E. DeRose
Supreme Court No.: 0055214
BARKAN MEIZLISH HANDELMAN GOODIN DEROSE WENTZ, LLP
250 E. Broad St., 10th Floor
Columbus, Ohio 43215
Phone: 614-221-4221

and

David D. Langfitt (PHV No. 5921-2015)
Melanie J. Garner (PHV No. 6051-2015)
LOCKS LAW FIRM
The Curtis Center
Suite 720 East
601 Walnut Street
Philadelphia, PA 19106
Phone: (215) 893-3423

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on December 11, 2015 using the CM/ECF filing system of the Eighth Appellate District which I understand will send a notice of electronic filing to all parties of record through the Appellate Court's system, and was also served via regular mail on the following counsel of record for the Defendants-Appellees:

Matthew A. Kairis
Aaron M. Healey
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215-2673
Attorneys for Defendant-Appellee University of Notre Dame

Steven A. Friedman
Frederick R. Nance
Sean L. McGrane
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Attorneys for Defendant-Appellee National Collegiate Athletic Association

Respectfully submitted,

/s/ Robert E. DeRose
Robert E. DeRose, Esquire

APPENDIX

Exhibit A

90731363

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STEVEN SCHMITZ ET AL
Plaintiff

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL
Defendant

Case No: CV-14-834486

Judge: DEENA R CALABRESE

JOURNAL ENTRY

89 DIS. W/PREJ - FINAL

DEFENDANT NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S MOTION TO DISMISS THE CLAIMS ASSERTED BY PLAINTIFFS STEVEN & YVETTE SCHMITZ, FILED 03/03/2015, IS GRANTED.
DEFENDANT UNIVERSITY OF NOTRE DAME'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT, FILED 03/03/2015, IS GRANTED.
COURT COST ASSESSED TO THE PLAINTIFF(S).
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Deena Calabrese
Judge Signature 09/01/2015

- 89
08/31/2015

Exhibit B

90844447

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STEVEN SCHMITZ ET AL
Plaintiff

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL
Defendant

Case No: CV-14-834486

Judge: DEENA R CALABRESE

JOURNAL ENTRY

PLAINTIFF'S MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW, FILED 09/09/2015, IS DENIED.

Deena Calabrese
Judge Signature 09/10/2015

09/09/2015

Exhibit C

Copies to: Jason E. Luckasevic, Esq; Arthur W. Hankin, Esq.; Robert E Dapper, Jr. Esq.; File

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

MATTHEW ONYSHKO and JESSICA ONYSHKO, his wife,

Plaintiffs,

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Defendant.

No. 2014-3620

ENTRY OF OPINION, ORDER, DECREE, ADJUDICATION OR JUDGMENT FILED 12-3-14
MAILED 12-4-14
J. Luckasevic

ORDER

AND NOW, this 3rd day of DECEMBER, 2014, it is hereby ORDERED, ADJUDGED, and DECREED that the Defendants' preliminary objections are OVERRULED.

This action arises out of plaintiff Matthew Onyshko's recently diagnosed brain and spinal cord injuries he attributes to repeated blows to his head suffered during his five-year collegiate football career at California University of Pennsylvania. In June of 2014, Onyshko and his wife filed a two-count complaint alleging negligence and loss of consortium against the National Collegiate Athletic Association (NCAA) based on its failure to adequately supervise, regulate, and minimize the risk of long-term brain injury resulting from repeated head impacts. In response, the NCAA filed the instant preliminary objections, arguing that plaintiffs' complaint should be dismissed for legal insufficiency under Pennsylvania Rule of Civil Procedure 1028(a)(4) because plaintiffs have not alleged any legally recognizable duty owed to them by the NCAA.

When ruling on preliminary objections in the form of a demurrer, a court must accept as true all well-pleaded, material and relevant facts, as well as every inference reasonably deducible from

those facts. *Willet v. Pennsylvania Med. Catastrophe Loss Fund*, 702 A.2d 850, 853 (Pa. 1997) (citations omitted). Preliminary objections which result in a denial of the pleader's claim or the dismissal of his suit should only be sustained in cases that clearly and without a doubt fail to state a claim for which relief may be granted under any theory of law. *Id.* Where doubt exists as to whether a demurrer should be sustained, the doubt should be resolved in favor of overruling it. *Id. See also Chem v. Horn*, 725 A.2d 226, 228 (Pa. Cmwlth. 1999) (stating that "[t]he question presented by a demurrer is whether, in the facts averred, the law says with certainty that no recovery is possible.").

Plaintiffs argue that the NCAA owed them a legally recognizable duty based on the NCAA's (1) failure in its undertaking to provide adequate educational and safety standards for student athletes relating to long term consequences of head impacts, (2) failure in its undertaking to assist member institutions in protecting student athletes, (3) assumption of a duty to student athletes by undertaking to act as a leader in providing "healthy and safe" environments, and (4) assumption of the duty owed to student athletes by member institutions to formulate safety guidelines. Plaintiff's Brief in Opposition to Preliminary Objections, at 5-12. Conversely, the NCAA argues that there "simply is no duty under Pennsylvania law to protect another from inherent risks in an activity," Defendant's Reply Memorandum, at 1, relying on *Craig v. Amateur Softball Ass'n of Am.*, 951 A.2d 372 (Pa. Super. 2008) - a case invoking the "no-duty rule" to affirm summary judgment in favor of the Amateur Softball Association of America (ASA) on a negligence claim brought by a player for injuries suffered during a game organized under ASA rules.

Craig premised his claim primarily on the theory that "ASA had a duty to recommend and/or mandate [he] wear a helmet," *Craig*, 951 A.2d at 374, or in other words - the ASA had a duty to implement proper safety standards for its games but failed to do so. The Onyshkos do not claim that the NCAA had a general duty to mandate safety standards; they claim instead that once the NCAA voluntarily undertook to guarantee player safety, it had a duty to protect those who relied on this

guarantee. Put another way, Onyshko does not claim that the NCAA permitted him to play without a helmet; he claims the NCAA falsely guaranteed that his helmet would protect him – and it did not.

The Onyshkos also advance a theory of liability not addressed at all by the *Craig* court – that the NCAA assumed the duty owed to student athletes by member institutions to formulate safety guidelines. They rely on ***Kleinknecht v. Gettysburg Coll.***, 989 F.2d 1360, 1374 (3d Cir. 1993), where the Third Circuit held that Gettysburg College owed a duty of care to a lacrosse player who suffered a cardiac arrest during a lacrosse game because the college "actively sought his participation in that sport." *Id.* at 1368. The NCAA claims *Kleinknecht* is inapplicable because it applies only to situations where a player has been "actively recruited" by an institution. Defendant's Reply Memorandum, at 9. This argument misreads *Kleinknecht* as the Third Circuit merely identified recruiting as one possible example of a college actively seeking a player's participation. Although the NCAA does not "recruit" athletes, it does actively seek – and benefit from - their participation in a variety of other ways including advertising, merchandise sales, and television contracts.

At this preliminary stage before discovery, we cannot say that plaintiffs have "clearly and without a doubt fail[ed] to state a claim . . . under any theory of law" as plaintiffs have specifically identified at least four possible theories for the existence of a duty. Though the NCAA disputes the plaintiffs' version of facts underlying these theories, we must accept them as true – and all inferences reasonably deducible from them. Accordingly, defendant's preliminary objections are OVERRULED.

BY THE COURT:

Katherine B. Emery

KATHERINE B. EMERY, JUDGE